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No. 743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SOUTHERN PILOTS ASSOCIATION, et al.,
Petitioners

v.

CIVIL AERONAUTICS BOARD,
Respondent

and

AIR LINE PILOTS ASSOCIATION,
Intervenor

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

CIVIL AERONAUTICS BOARD,
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and

AIR LINE PILOTS ASSOCIATION,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Southern Pilots Association and its individual members pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on June 13, 1963, which dismissed as moot petitioners' petition for review of orders of the Civil Aeronautics Board.

OPINION BELOW

The opinion of the court below (Appendix B) is reported at 323 F. 2d 288-290. The orders of the Civil Aeronautics Board are No. E-18560, issued July 5, 1962,

No. E-18737, issued August 27, 1962 and No. E-19162, issued January 3, 1963 (R. 2612, 2678, 2779).

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1963, and a petition for rehearing en banc was denied October 14, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Section 1006(f) of the Federal Aviation Act of 1958, 72 Stat. 795, 49 U.S.C. 1486(f).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly dismissed as moot the petition for review.

2. Whether the Civil Aeronautics Board had jurisdiction to entertain a complaint filed by a labor union and to determine that an air carrier had failed to bargain collectively and so had violated the Railway Labor Act and the Federal Aviation Act of 1958.

3. Whether the Board had authority, under the guise of so-called "guidelines", to dictate the terms of a collective bargaining agreement.

4. Whether the labor union's failure to represent the individual petitioners before the Board invalidates the Board's proceedings.

5. Whether the proceedings before the Board were invalid because the petitioners were not parties thereto.

6. Whether the Board's findings that the air carrier failed to bargain in good faith are supported by the record.

STATUTES INVOLVED

The relevant provisions of the Federal Aviation Act of 1958 and the Railway Labor Act are set forth in Appendix A.

STATEMENT

Petitioners are aircraft pilots who were hired by Southern Airways, Inc. (Southern) after June 5, 1960 (R. 2686), together with the association which petitioners formed about September 25, 1962 (R. 2686). The individual petitioners were employed as replacements for other pilots, members of Air Line Pilots Association (ALPA), who engaged in a prolonged strike against Southern commencing June 5, 1960 over hours, wages and working conditions (R. 2561).

The proceeding before the Board (*Air Line Pilots Association v. Southern Airways, Inc.*, CAB Docket No. 11,654 (R. 2611, 2678), which resulted in the orders already mentioned, was initiated on a complaint filed by ALPA July 22, 1960 which alleged that Southern had failed to bargain with it in good faith and had thereby violated the Railway Labor Act (45 U.S.C. 151) and the Federal Aviation Act of 1958 (49 U.S.C. 1301) (R. 1-9).[1] Hearings were held before a Board examiner from December 1, 1960 to January 18, 1961, but the individual petitioners herein were not made parties to the proceeding, were not served with any notice of the proceeding, and were not called as witnesses (R. 77, 81, 1118). Notices of the hearing, published in the Federal Register, gave only the time and place of a hearing involving ALPA and Southern and did not recite facts indicating that petitioners' employment rights were in jeopardy (25 Fed. Reg. 10372 and 10667).

ALPA is and was the bargaining representative, certified as such under the Railway Labor Act, of all pilot employees of Southern (R. 2), yet it opposed the inter-

[1] ALPA also sought similar relief in the United States District Court for the Middle District of Tennessee. This proceeding culminated in a decision by that court dated February 26, 1962 and an order dated April 27, 1962, both reported as *ALPA v. Southern*, 49 L.R.R.M. 3145, and otherwise unreported.

ests of the petitioners throughout the proceeding (see, for instance, R. 3, 2562, 2584).

On July 5, 1962 the Board issued its first decision and order, No. E-18560, which, by a 3-2 majority, directed Southern to bargain with ALPA (R. 2568-2612). The order also required Southern to reinstate all of the striking pilots who had been replaced on or after July 12, 1960 and to discharge or furlough as many of the individual petitioners as might be necessary in order to accomplish this (R. 2589, 2612). This order was modified August 27, 1962 by Order No. E-18737, which required Southern to give the reinstated pilots seniority over all of the individual petitioners, including those hired prior to any possible unfair labor practice (R. 2678-2680). Southern entered into a so-called back-to-work agreement with ALPA on September 21, 1962 which purported to comply with the Board's two orders (R. 2756). As its provisions show, the purpose of this back-to-work agreement was to govern the administration and readjustments of rights of striker and non-striker pilot personnel on an interim basis until the permanent provisions of a collective employment agreement which was simultaneously negotiated could become fully effective (R. 2756-2779). Petitioners were not parties to either of these collective agreements.

Within about one month after the back-to-work agreement was made, petitioners (1) filed their petition in the court below for review of the Board orders under Section 1006 of the Federal Aviation Act of 1958 (49 U.S.C. 1486), (2) filed a petition with the Board seeking intervention, rehearing and reconsideration (R. 2586), and (3) filed a complaint in the United States District Court for the Northern District of Georgia seeking to enjoin enforcement of the back-to-work agreement. The court below denied the petition for review, solely on the ground that the said agreement had mooted the case,

that is, that this agreement had insulated the Board's orders from any effective reversal in the courts. The Board dismissed the petition filed with it (Order No. E-19162, January 3, 1963, R. 2779). The District Court in Georgia dismissed petitioners' complaint because in that court's view the complaint constituted in reality an attack upon the Board's orders and so was beyond the jurisdiction of the court (*Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407, 1962, appeal pending).

REASONS FOR GRANTING THE WRIT

1. The Case is Not Moot.

a. The Court of Appeals' dismissal of the petition for review as moot was erroneous because of the continued existence of rights and duties which are affected by the challenged orders of the Civil Aeronautics Board.

(1) Petitioners have attacked the validity of the back-to-work agreement in the Federal District Court in Georgia. That Court dismissed the complaint on the grounds that it constituted an attempted review of the Board orders which was beyond its jurisdiction. *Holman* v. *Southern Airways, Inc., supra*, appeal pending. Thus the Federal Court in Georgia held that petitioners' attack on the back-to-work agreement is barred by the petitioners' inability to reach the Board orders in that court. The Court of Appeals for the District of Columbia in the instant case held that a decision by it on the validity of the Board orders would have no effect because the rights and duties of the parties are now controlled by the back-to-work agreement. Thus petitioners are caught in a cross-fire. They cannot attack the Board orders in the Court of Appeals because of the agreement; and they cannot attack the agreement in the District Court because of the continuing vitality of the Board orders. There must be redress somewhere. If this Court were to

reverse the Board, petitioners could then pursue their remedy in the District Court.

(2) While petitioners were not formal parties to the proceedings before the Board, they do have the right to appeal the Board's orders (Federal Aviation Act, § 1006 (a), 49 U.S.C. 1486(a)). This right cannot be destroyed by the unilateral action of the two formal parties. If it can be, the command of the statute relative to the parties who can appeal is nullified.

(3) In Order No. E-18560, July 5, 1962, the Board ordered Southern to "bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act" (R. 2612) and in accordance with its opinion of that date. Section 2, First, of the Railway Labor Act (45 U.S.C. 152) provides:

> "It shall be the duty of all carriers . . . to make every reasonable effort to make *and maintain* [collective bargaining] agreements . . ." (emphasis supplied).

(4) Section 401(k)(4) of the Federal Aviation Act (49 U.S.C. 1371(k)(4)) imposes upon air carriers the continuing obligation to bargain with their employees and requires continuing compliance as a condition for retention of the air carrier's certificate. Cf. *Conley* v. *Gibson*, 355 U.S. 41, 46 (1957), where this Court held that the bargaining duties of employee representatives under the Railway Labor Act continue after a collective agreement is reached. Thus it is Southern's duty, as required by the Board and by statute, to bargain collectively with ALPA and to make *and maintain* its collective bargaining agreements, including the provisions which the Board said must be incorporated in the back-to-work agreement, subject to the powerful sanction of loss of its certificate under § 401(g) of the Federal Aviation Act. (49 U.S.C. 1371(g)).

(5) The Board's order also provided that it retained jurisdiction "until further notice for the purpose of assuring compliance by Southern Airways, Inc. with this order" (R. 2612). No such notice has ever been issued, and the Board has never found that its orders have been complied with. If, for instance, Southern were now to violate the agreement, the Board might well hold it had violated the orders. The Board might then impose the sanction of suspension which it had expressly withheld "pending further developments" (R. 2587).

(6) Southern and ALPA themselves recognized the continuing jurisdiction of the Board. Paragraphs 12 and 15 of their back-to-work agreement provide:

> 12. "This Memorandum of Agreement shall continue to be effective until all pilots listed on Attachment "A" are fully restored to active flying status or eighteen (18) months from the effective date hereof, whichever shall last occur; except that the provisions of paragraphs 1.C, 2.A, 2.B[2] are to be continued and shall not be subject to termination at any time." (R. 2763)
>
> 15. "The parties shall from time to time report to the Civil Aeronautics Board concerning the effectuation of the orders of such Board and of the foregoing Agreement." (R. 2763)

b. ***The decision below is in conflict with decisions of this Court and of United States Courts of Appeals and should be reversed by this Court.***

(1) In *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944), the Labor Board sought enforcement of an order directed

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[2] 1C provides for no discrimination by Southern against pilots because of their status as strikers (R. 2756). 2A provides for superseniority of the returning strikers over petitioners (the replacement pilots) (R. 2758). 2B provides for accrual of seniority of the striking pilots and fulfilling of probationary status during the strike (R. 2758).

by it to an employer to bargain upon request and to cease giving effect to conflicting individual contracts with its employees. While lower court proceedings were pending, the parties negotiated a collective agreement and the individual contracts expired. The Court considered the question of mootness and concluded that the case was not moot "in view of the continuing character of the obligation imposed by the order."

(2) The decision appealed from conflicts with the decision of this Court in *N.L.R.B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1958), where it was held that an order of the Labor Board lawful when made does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made

(3) In *N.L.R.B.* v. *United Brotherhood of Carpenters, etc.*, 184 F. 2d 60 (CA 10th, 1950, cert. den. 341 U.S. 947, 1951) where a secondary boycott was involved, a cease and desist order was issued. Subsequently, a collective bargaining agreement was entered into, the pending strike was settled and pickets were withdrawn. The Court of Appeals held that such an order, lawful when issued, does not become moot merely because changed circumstances indicate a diminished need therefor, and that the discontinuance or abandonment of an unfair labor practice after the issuance of such an order does not deprive the Board of its right to secure an order of enforcement from the cognizant Court of Appeals.

(4) The decision below conflicts with the decision of the Court of Appeals for the Sixth Circuit in *N.L.R.B.* v. *Oertel Brewing Company*, 197 F. 2d 59 (1952). That case involved discharge of employees in one union. After charges of unfair labor practices were filed, a new bargaining agreement was entered into. Jobs which constituted the matter in issue were eliminated from the provisions of the new agreement. Although the court rec-

ognized that the company had abandoned the forbidden practice and that the controversy could not arise again it nevertheless held that the issue was not moot. See also the following cases where it was held that abandonment of a practice does not render a matter moot; *N.L.R.B.* v. *F. H. McGraw & Co.*, 206 F. 2d 635 (CA 6th, 1953); *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 192 F. 2d 577 (CA 10th, 1951); *N.L.R.B.* v. *United Brotherhood of Carpenters, etc.*, 181 F. 2d 126 (CA 6th, 1950).

c. This matter involves important questions in the application and enforcement of national labor laws within the air transportation industry which should be resolved on their merits.

As noted by the Court below, "This is the first case to reach the courts in which the Civil Aeronautics Board has purported to pass on labor disputes." 323 F. 2d at p. 289. The Board was then 24 years old. This unique interpretation of the Federal Aviation Act of 1958 seriously affects enforcement of the Railway Labor Act in air transportation. Until now, enforcement of the Railway Labor Act has been in the courts.

2. The Board did not have jurisdiction to entertain the complaint or to determine that the air carrier had failed to bargain collectively and so had violated the Railway Labor Act.

In determining that it had jurisdiction in this case, the Board relied primarily on Section 401(k)(4) of the Federal Aviation Act of 1958, which provides:

> "It shall be a condition upon the holding of a certificate by any carrier that such carrier shall comply with Title II of the Railway Labor Act, as amended." (49 U.S.C. 1371(k)(4)).

The Board reasoned that since it is the agency which certificates air carriers (Section 401(a) of the Act, 49 U.S.C. 1371(a)), it necessarily has the authority to determine whether a carrier is in compliance with the Railway Labor Act. It recognized, however, that "the exact role the Board is to play in the enforcement of obligations placed on air carriers by the Railway Labor Act is unsettled." It noted that even if it had authority to determine unfair labor practice charges against a carrier, it had no such authority with respect to a union (R. 2586).

The Board observed that "the legislative history of Section 401(k)(4) is of little or no help." (R. 2564) When the labor provisions of the predecessor statute, the Civil Aeronautics Act of 1938, were under consideration, however, the Congressional committees having charge of that legislation considered and then discarded a so-called "penalty" provision, which would have specifically empowered the Board to determine violations of the Railway Labor Act and, upon such determination, mandatorily to suspend an air carrier's certificate for such a violation (See Senate Commerce Committee Hearings on S. 3659, 75th Congress, pp. 64-67; House Commerce Committee Hearings on H.R. 9738, 75th Congress, pp. 213, 235-240, 366-367; House (Conference) Report No. 2635, 75th Congress, p. 69). Instead, the Committees retained a so-called "compliance" provision and a general power of suspension provision, which became Sections 401(l)(4) and 401(h) of the Civil Aeronautics Act of 1938 and later Sections 401(k)(4) and 401(g) of the Federal Aviation Act of 1958 (49 U.S.C. 1371(k)(4) and 1371(g)). In the light of this, it seems improbable that Congress, in including these two provisions, intended to grant to the Board the Board powers over labor relations which the Board has exercised in this case.

The Railway Labor Act was enacted in 1926 (45 U.S.C. 151, et. seq.) to provide ways and means for peaceful settlement of disputes involving rail carriers and their

employees (Section 2, First). It created certain specific rights for employees, including the right to designate representatives (Section 2, Third), the right to organize, and to bargain collectively (Section 2, Fourth), and the right to be free from agreements not to join labor organizations (Section 2, Fifth). It placed in the National Mediation Board certain powers and functions of mediation and arbitration and it authorized the creation of an Emergency Board to investigate and report to the President on any dispute not resolved by mediation or arbitration under the Act when in the judgment of the Board and the President, the national interest might require such action. But the Act gave no authority to any regulatory agency to enforce these provisions or to impose sanctions or remedial measures.

The question of the enforceability of rights created under the Railway Labor Act was resolved in *Texas & N.O.R. Co. v. Brotherhood*, 281 U.S. 548 (1930) where such rights were held to be enforceable in the courts:

> "It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings." (Page 567)

> "If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose, as the present suit demonstrates." (Page 568)

> "As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." (Page 569)

This question was again before the Court in *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515

(1937) where the principles of *Texas* v. *Brotherhood* were affirmed and it was further said:

> "It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." [Page 545]

Subsequent decisions are to the same effect.[1]

Enactment of Title II of the Railway Labor Act in 1936 extended to air carriers and their employees all of the provisions of the 1926 Act except those contained in Section 3, which established and set forth the duties and functions of the National Railway Adjustment Board (45 U.S.C. 181, et seq.). By this amendment the principle of court enforcement already established became applicable to air carrier employees and they have looked to the courts for enforcement of their rights under the Railway Labor Act since that time.[2]

The Board's lack of expertise in labor relations matters is a factor which militates against its asserted jurisdiction in this case. As observed in *Outland* v. *CAB*, 284 F. 2d 224 (C.A. D.C. 1960), "the Board's experience

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[1] *Steele* v. *L. and N. R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Brotherhood* v. *Howard*, 343 U.S. 763 (1952); *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Elgin J. & E. R.R. Co.* v. *Burley*, 325 U.S. 711 (1945), rehearing 327 U.S. 661; *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (CA D.C. 1941); *Edwards* v. *Capital Airlines*, 176 F. 2d 755 (CA D.C. 1949).

[2] *Transcontinental Air Lines* v. *Koppal*, 345 U.S. 653 (1953); *Ferris* v. *Alaska Air Lines*, 113 F. Supp. 907 (D.C.W.D. Wash., 1953); *Sigfred* v. *Pan American Air Lines*, 122 F. Supp. 881 (D.C.S.D. Fla., 1954); *Brady* v. *Trans World Airlines*, 156 F. Supp. 82 (D.C.D. Del., 1957); *American Air Lines* v. *Air Line Pilots Ass'n.*, 169 F. Supp. 177 (D.C.S.D. N.Y., 1958); *Bullock* v. *Capital Air Lines*, 176 F. Supp. 449 (D.C.E.D. N.Y., 1959); *Northwest Air Lines* v. *Machinists*, 178 F. Supp. 853 (D.C.D. Minn., 1959); *Pan American World Airways* v. *T.W.U.*, 51 L.R.R.M. 2170 (D.C.E.D. N.Y., 1962, unreported otherwise).

and expertise is with transportation, not labor relations." In that case the court below upheld the Board in declining to resolve a labor dispute relative to integration of conflicting pilot seniority lists.

Only recently, in *Burlington Truck Lines* v. *U. S.*, 371 U.S. 156, (1962), this Court observed that "Expert discretion is the life blood of the administrative process" and that expertise is "the strength of modern government." In that case the Court reversed an order of the Interstate Commerce Commission for improperly injecting itself into labor relations matters beyond its competence.

Petitioners here contend that the Civil Aeronautics Board has also attempted to deal with a labor dispute in excess of its jurisdiction and beyond its competence. Instead of undertaking to determine whether Southern should retain its air carrier's certificate, a matter within its jurisdiction under Section 401(k)(4) of the Act, the Board sought to resolve a prolonged labor dispute by laying down detailed "guidelines" for the disputing parties. The Board did this despite its knowledge, as disclosed in its opinion, that a Federal court had reached an opposite determination on the same basic issues, between the same parties, in a parallel case (*ALPA* v. *Southern*, 49 L.R.R.M. 3145, U.S.D.C., M.D., Tenn. 1962, unreported otherwise; see Board Decision herein, July 5, 1962, R. 2565; minority opinion, R. 2593). In that case, the Court found no failure to bargain in good faith on the part of Southern. If the Board had desired to limit its concern to the enforcement of Section 401(k)(4), it should have relied upon the findings and conclusions of the Federal court, with the result that determination of the labor dispute would have been resolved by the agency to which this responsibility had been entrusted, i.e., the federal judiciary.

An alternative forum, still not the CAB, might be the Emergency Board established by Section 10 of the Railway Labor Act, 49 U.S.C. 160. There has recently been publicity about the de-

If, however, the Board's determination of jurisdiction in this case is upheld, it will posses substantially the same broad authority in the labor field with respect to air carriers as is possessed by the National Labor Relations Board with respect to other employers (see 61 Stat. 141; 29 U.S.C. 150 et seq.).

3. The Board did not have authority under the guise of guidelines, to dictate terms of a collective agreement.

The Board's Opinion and Order (No. E-18560) of July 5, 1960 and its Order (No. E-18737) of August 27, 1962 told the parties what the agreement must provide with respect to seniority and job retention rights of the pilot groups. In its opinion the Board said:

> "Under these principles, Southern would be permitted to retain as permanent employees those replacement pilots hired prior to July 12, 1960; strikers replaced on or after July 12, 1960, would be entitled to reinstatement if they desire and so request, and if necessary Southern would be required to furlough or dismiss replacement pilots hired on or after July 12, 1960, to make room for them; and the seniority and other rights and privileges of the strikers should continue unimpaired. Further, strikers not reinstated because they were replaced prior to July 12, 1960 and replacement employees furloughed to make room for reinstated strikers should, if they request, be placed by Southern on a preferential hiring list for the filling of future vacancies in the order of their seniority. Southern would be permitted to discipline its employees as it sees fit, but any such action would be subject to statutory grievance procedures. In providing these guidelines we do not intend to preclude the parties from reach-

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cision of an emergency board established for the Florida East Coast Railway strike. Set, for instance, 54 L.R.R. 435, December 30, 1963. The services of an Emergency Board in the instant case were never invoked.

ing an agreement which may differ therefrom. On the other hand, any substantial and unjustifiable deviation from these guidelines will, if persisted in, be taken into consideration in determining whether the requirement of good faith bargaining has been met." (R. 2589).

In its "finding" No. 7 (R. 2591), the Board said:

> "That Southern should be ordered to comply forthwith with its obligations under the Railway Labor Act to bargain in good faith with ALPA, and compliance with such order should be achieved by Southern within a period of thirty (30) days after issuance thereof, failing which, Southern's authority to engage in air transportation would be subject to suspension or revocation pursuant to Section 401(g) of the Federal Aviation Act."

And then in its order of July 5, 1962 (R. 2612), the Board ordered that:

> "1. Southern Airways, Inc., shall within thirty (30) days after issuance of this order bargain collectively in good faith with ALPA as required by Section 2, First, of the Railway Labor Act and in accordance with the attached opinion;
>
> "2. The Board retain jurisdiction over this proceeding until further notice for the purpose of assuring compliance by Southern Airways, Inc., with this order."

In its order of August 27, 1962, (R. 2678), the Board was even more explicit as to what should be incorporated in a collective agreement. At R. 2679, the order states:

> "Upon consideration of Southern's petition, including the cases cited therein, the Board has determined that under its decision of July 5, 1962, Order E-18560, all strikers reinstated by Southern upon settlement of the strike, whether such reinstated pilots were captains or co-pilots or probationary

pilots at the time of the strike, are entitled to their respective places on the seniority list, ahead of all the replacement pilots retained by Southern."

Thus, the Board orders put Southern under compulsion either to accept the Board "guidelines" or lose its operating authority. The Board orders left Southern no room for bargaining. Its "guidelines" were actually directions. Such directions are contrary to the policies adopted by the Congress.

Neither an administrative agency nor a court may properly dictate the substantive terms of a collective agreement. As was said in *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943):

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions."

See also *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952) and *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477 (1960).

1. ALPA's failure to represent the individual petitioners, or to arrange for their appearance as parties, invalidates the proceedings.

ALPA had been designated and authorized by the National Mediation Board, under the Railway Labor Act, to act as the collective bargaining representative of the pilot employees in the service of Southern (R. 2, 2613).

Section 2 of the Railway Labor Act requires ALPA to act on behalf of all the pilot employees, those who are its members and those who are nonmembers. *Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Brotherhood* v. *Howard*, 343 U.S. 768 (1952); *Ford Motor Company* v. *Huffman*, 345 U.S. 330 (1953); *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Mount* v. *Locomotive Engineers*, 226 F. 2d 605 (CA 6th, 1955, cert. den. 350 U.S. 967, 1956); *Cunningham* v. *Erie R.R.*, 266 F. 2d 411 (CA 2d, 1959).

ALPA not only failed to represent the petitioners before the CAB, but it consistently took an adverse position (see, for instance, R. 2679). It may have felt that its interest conflicted with theirs, as indeed it did, but in that case the least it should have done was see that petitioners were brought into the proceedings and into the negotiations. It did neither.

In this connection, Section 1009 of the Federal Aviation Act provides for the inclusion or intervention as parties, of "all persons interested in or affected by the matter under consideration." Service of process may be made early by mail (Section 1005(c)), but none was made in this case.

5. Petitioners were indispensable parties and the failure of the Board to bring them in as parties invalidates the proceedings.

When the ALPA pilots struck on June 5, 1960, Southern immediately began to recruit replacement pilots (R. 2679). By July 12, 1960 about 52 such replacements had been hired (id.), and by July 27-28 there were about 100 (R. 2562, 2602). The replacement pilots were still flying for Southern at the time of the CAB order on July 5, 1962.

The employment contracts of the replacement pilots were largely oral (R. 761-4); they were contracts nonetheless.

No petitioner was made a party to the proceeding before the Board, and none was served, although all were within the jurisdiction of the Board. None was notified of the hearing (see Notice of Hearing, R. 77, 81). None was called as a witness. Thus the rights of the petitioners to their jobs and to their seniority were adjudicated in their absence. Even so, the Board split 3-2 on the issue whether their employment was permanent (R. 2576, 2608).

"Indispensable parties" are "All whose interests will be affected by the decree, that is, all persons materially interested either legally or beneficially in the subject matter of the suit . . ." *Green* v. *Brophy*, 110 F. 2d 539 (CA D.C., 1940). In the *Green* case, which involved an attempt by the A.F. of L. to recover from the C.I.O. monies which a local union had paid to the C.I.O. but allegedly should have paid to the A.F. of L., the Court said that the relationship between the A.F. of L. and the local was an issue, and that therefore the local was an indispensable party which "must affirmatively be given an opportunity to assert its rights."

The *Green* case was followed in *Olson* v. *Miller*, 263 F. 2d 738 (CA D.C., 1959), and the two decisions point up the long-settled rule that persons with conflicting claims to a fund are indispensable parties to litigation involving that fund. *Williams* v. *Bankhead*, 86 U.S. 563 (1874); *U.S.* v. *Bank of New York & Trust Company*, 296 U.S. 463 (1936); *Brown* v. *Christman*, 126 F. 2d 625 (CA D.C. 1942). In the instant case, jobs, not a fund, are involved, but this is not a distinction.

In *Consolidated Edison Company* v. *N.L.R.B.*, 305 U.S. 197 (1938), the N.L.R.B., on charges filed by a C.I.O. affiliate, invalidated contracts between the company and certain A.F. of L. affiliates which were not parties to the proceeding before the Board. The A.F. of L. affiliates entered the case for the first time by petition to the Court of Appeals, just as the petitioners in

this case have done. This Court held that the contracts between the company and the A.F. of L. affiliates could not be invalidated in the absence of the affiliates. It said:

> "We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. . . . The rule, which was applied in the case cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here" (p. 233).

The Court distinguished the situation in the *Consolidated Edison* case from that in *N.L.R.B.* v. *Pennsylvania Greyhound Lines*, 303 U.S. 261 (1938), where the Board had invalidated a contract between the company and a company-dominated union which was not a party. The Court affirmed. The distinguishing rationale appears to be that a company-dominated union is simply an arm of the company, and is therefore a party to the proceeding through the company itself.

The instant case is analagous to *Consolidated Edison*, not to *Pennsylvania Greyhound*. The petitioners here had employment contracts with Southern. There is no finding that they were company-dominated. Petitioners had a right not to organize and therefore a right to make individual contracts. Had they been organized into a non-company-dominated union, that union would have been in the same position as the A.F. of L. affiliates in *Consolidated Edison*. That the petitioners were acting individually can make no difference.

The petitioners' arguments are particularly cogent with respect to the 52 replacement pilots who were hired prior to July 12, 1960.[*] Even the majority of the Board

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[*] The majority of the Board was mistaken in connection with the date of July 12, 1960. As the minority pointed out, the date should have been July 28 (R. 2593; see also Opinion of Judge

held that the company committed no unfair labor practices prior to July 12. Under these circumstances, pilots hired prior to that date had to be parties to any proceeding which materially affected their rights.

6. The Board's findings that Southern failed to bargain in good faith are not supported by the record.

Two issues were dealt with by the Board in its findings with respect to Southern not having bargained in good faith: unreviewable discipline and seniority.

(1) *The finding as to unreviewable discipline.* There is conflicting evidence as to whether the company took an inflexible position on its power of unreviewable discipline or whether this was simply a bargaining position. The minority of the Board (R. 2601-2), the examiner who heard the evidence (R. 2246-51), and the United States District Court in Tennessee (Op., p. 34, see R. 2565, 2593) all found that the company's position was not inflexible, but, if we accept the majority's findings it still appears that the Company had abandoned its demand after the District Court's decision in *ALPA* v. *Southern*, supra, February 16, 1962, and thus the Board was not justified in placing its decision of July 25, 1962 on this ground.

(2) *The finding as to seniority.* Petitioners rest their argument that Southern rightfully demanded job protection for the replacement pilots on the decisions of this Court in *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) and of the Courts of Appeals in *N.L.R.B.* v. *Potlatch Forests*, 189 F. 2d 82 (CA 9th, 1951), and *N.L.R.B.* v. *Lewin-Mathes Co.*, 285 F. 2d 871 (CA 7th, 1960). *Mackay* established the right of an employer to hire permanent replacements for economic strikers.

Miller, *ALPA* v. *Southern Airways*, CA No. 2982, D.C.M.D. Tennessee, p. 31). By July 28 a larger number of replacement pilots had been hired.

Erie Resistor Corp. v. *N.L.R.B.* 373 U.S. 221, decided by this Court May 13, 1963, did not overrule *Mackay;* further, the inducement offered by Erie Resistor Corporation to striker replacements and strikers who abandoned their strike involved a 20-year seniority credit, unlike the job offer made by Southern to its replacement pilots which did no more than promise permanency of employment within the rule of the *Mackay* case.

As the strike in this case was economic in its inception, Southern had the right, under the cited decisions, to employ replacement pilots on a permanent basis if necessary in order to carry on its business, and to reinstate strikers as needed, crediting seniority to replacements from their dates or hire and to strikers from their dates of reinstatement. Having the right so to conduct its business, Southern had the right to propose this in its bargaining negotiations. It follows that it cannot be charged with bad faith bargaining in doing so. Indeed, it had a duty as well as a right to inform both the replacements and the strikers of its intentions in this regard.

Southern's employment practices are justified under the foregoing decisions not as a form of "superseniority," but as normal incidents of hiring and reinstating employees under the circumstances of an economic strike.

The Board majority indicated it was not satisfied with the showing in the record as to the need for Southern to give replacement pilots employment on an indefinite ("permanent") hire basis. But this incompleteness is the result of the Board's failure to bring petitioners in as parties, for which petitioners, too, complain (p. 17 above).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

THE FEDERAL AVIATION ACT OF 1958

* * * *

TITLE IV—AIR CARIRER ECONOMIC REGULATION

Certificate of Public Convenience and Necessity

Certificate Required

Section 401 (a). No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation. [49 U.S. Code 1371 (a)].

* * * *

Authority to Modify, Suspend, or Revoke

Section 401 (g). The Board upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate. [49 U.S. Code 1371 (g).]

* * * *

Compliance With Labor Legislation

Section 401 (k) (4). It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended. [49 U.S. Code 1371 (k) (4).]

* * * * * *

Complaints to and Investigations by the Administrator and the Board

* * * * *

Entry of Orders for Compliance With Act

Section 1002 (c). If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith. [49 U.S. Code 1482 (c).]

* * * * *

Orders, Notices, and Service

* * * * *

Other Methods of Service

Section 1005 (c). Service of notices, processes, orders, rules, and regulations upon any person may be made by personal service, or upon an agent designated in writing for the purpose, or by registered or certified mail addressed to such person or agent. Whenever service is made by registered or certified mail, the date of mailing shall be considered as the time when service is made. [49 U.S. Code 1485 (c).]

* * * * *

Judicial Review of Orders

Orders of Board and Administrator Subject to Review

Section 1006 (a). Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore. [49 U.S. Code 1486(a).]

* * * *

Findings of Fact Conclusive

Section 1006 (e). The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so. [49 U.S. Code 1486(e).]

Certification or Certiorari

Section 1006 (f). The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code. [49 U.S. Code 1486(f).]

* * * *

Joinder of Parties

Section 1009. In any proceeding for the enforcement of the provisions of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit, whether such proceedings be instituted before the Board or be begun originally in any court of the United States, it shall be lawful to include as parties, or to permit the intervention of, all persons interested in or affected by the matter under consideration; and inquiries, investigations, orders, and decrees may be made with reference to all such parties in the same manner, to the same extent, and subject to the same provisions of law as they may be made with respect to the persons primarily concerned. [49 U.S. Code 1489.]

RAILWAY LABOR ACT
TITLE I

* * * *

General Purposes

Section 2. The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. [45 U.S.C. 151a.]

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, or-

ganize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions; Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * * * *

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine

and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; Provided, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent * * * [45 U.S.C. 152.]

* * * * *

Functions of Mediation Board

Section 5. First. The parties or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days. * * * [45 U.S.C. 155.]

Arbitration

Section 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in section 151-156 of this title such controversy may, by

agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons; Provided, however, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise. * * * [45 U.S.C. 157.]

* * * * *

Emergency Board

Section 10. If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable; Provided, however, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

* * * * *

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. [45 U.S.C. 160.]

* * * *

TITLE II

* * * * * *

Section 201. All of the provisions of title I of this Act, except the provisions of section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service. [45 U.S.C. 181.]

Section 202. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of title I of this Act, except section 3 thereof, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title. [45 U.S.C. 182.]

Section 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under this title in the same manner and to the same extent as are the disputes covered by section 5 of title I of this Act. [45 U.S.C. 183.]

Section 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group or carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction. [45 U.S.C. 184.]

APPENDIX B

(323 F.2d 288)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,362

SOUTHERN PILOTS ASSOCIATION,
LEWIS H. HOLMAN, ET AL., PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
INTERVENOR

Petition for Review of Orders of the
Civil Aeronautics Board

Decided June 13, 1963

Mr. Nicholas E. Allen, with whom *Mr. Philip F. Herrick* was on the brief, for petitioners. *Mr. John S. Yodice* also entered an appearance for petitioners.

Mr. O. D. Ozment, Associate General Counsel, Litigation and Legislation, Civil Aeronautics Board, with whom *Messrs. John H. Wanner*, General Counsel, and *Joseph B. Goldman*, Deputy General Counsel, Civil Aeronautics Board, and *Lionel Kestenbaum*, Attorney, Department of Justice, were on the brief, for respondent.

Mr. James L. Highsaw, Jr. for intervenor.

Before BAZELON, *Chief Judge*, PRETTYMAN, *Senior Circuit Judge*, and WRIGHT, *Circuit Judge*.

WRIGHT, *Circuit Judge*: This case involves a petition for review [1] of a rather unusual [2] order [3] of the Civil Aeronautics Board which finds Southern Airways, Inc. guilty of unfair labor practices under the Railway Labor Act. Review is also sought of the denial by the Board of petitioners' application to intervene in the Board proceeding and for rehearing.[4] We dismiss the petition for review as moot.

On July 30, 1959, the Air Line Pilots Association (ALPA), the certified bargaining agent for the pilot employees of Southern Airways, notified the airline that it desired certain changes in the existing collective bargaining agreement. After extended negotiations failed to bring agreement, ALPA called a strike on June 5, 1960. The airline, while continuing negotiations, commenced hiring replacement pilots and gradually resumed full operations. On July 12, 1960, the airline made two demands at the bargaining conference with ALPA: (1) the right to discipline returning strikers for misconduct during the strike without recourse to statutory grievance procedures, and (2) super-seniority for the replacement pilots.

Based on these demands, ALPA filed what was in essence an unfair labor practice charge against the airline with the Board, relying upon Section 401(k)(4) [5] of the Federal Aviation Act. Overruling the airline's challenge to its jurisdiction, the Board found that both airline de-

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[1] Pursuant to 72 Stat. 795, 49 U.S.C. § 1486.

[2] This is the first case to reach the courts in which the Civil Aeronautics Board has purported to pass on labor disputes.

[3] *Air Line Pilots Association* v. *Southern Airways, Inc.*, Order No. E-18560, Docket No. 11654 (July 5, 1962), reported in part, 1A Av.L.Rep. ¶ 21,297, clarified Order No. E-18727 (Aug. 27, 1962), 1A Av.L.Rep. ¶ 21,813.

[4] *Air Line Pilots Association* v. *Southern Airways, Inc.*, Order No. E-19162, Docket No. 11654 (Jan. 3, 1963).

[5] 72 Stat. 757, as amended, 49 U.S.C. § 1371(k)(4).

mands constituted refusals to bargain in good faith, and directed the airline to commence good faith bargaining within 30 days. The Board also laid down certain "guidelines" for bargaining, stating that "the seniority and other rights and privileges of the strikers should continue unimpaired." Later, in response to a request for clarification, it stated "all strikers reinstated by [the airline] upon settlement of the strike * * * are entitled to their respective places on the seniority list, ahead of all the replacement pilots retained by [the airline]." Both ALPA and the airline filed timely petitions for review of the Board's order in the Fifth Circuit Court of Appeals and then resumed negotiations.[6] On September 21, 1962, they arrived at an agreement which, *inter alia*, gave the striking pilots seniority over all the replacements. As part of the agreement, the petitions for review were withdrawn.

Upon execution of the contract, the replacement pilots, petitioners here, realizing that they had been left out in the cold, hurriedly formed their own association and commenced a barrage of challenges.[7] On October 26, 1962, they filed a petition for review of the Board order in this court,[8] and on October 29 they petitioned the Board to re-

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[6] Petitioners were never parties, either before the Board or before the Fifth Circuit Court of Appeals, in this administrative proceeding.

[7] In addition to proceedings initiated in this court, petitioners, on November 2, 1962, filed suit in the Northern District of Georgia against the airline and ALPA to enjoin operation of the new contract. On November 9, 1962, the suit in the Northern District of Georgia was dismissed on the ground that it constituted an attempt collaterally to review the Board order, a function reserved to the several Courts of Appeals. *Holman* v. *Southern Airways, Inc.*, N.D. Ga., 210 F.Supp. 407 (1962), appeal pending. On January 23, 1963, the Fifth Circuit Court of Appeals ordered appeal from the decree of the District Court held in abeyance pending disposition of the instant petition. *Holman* v. *Southern Airways, Inc.*, Docket No. 20181 (Jan. 23, 1963).

[8] ALPA intervened in this proceeding. Southern Airways is not represented in any way.

open the proceedings, permitting them to intervene. On January 3, 1963, the petition to intervene and for a rehearing was denied by the Board.

Petitioners allege that the Board order stands in the way of their attempt, in other courts, to enjoin operation of the bargaining agreement on the ground that the union, with the concurrence of the airline, discriminated against the replacement pilots. But the proceeding now before us is solely for review of the Board's order and a decision by this court on the validity of that order would have no effect because the rights and duties of the parties are now controlled by the bargaining agreement subsequently entered into. The Board, as it pointed out in its opinion denying petitioners' application for rehearing and intervention, has no jurisdiction to pass upon designations of bargaining agents or charges of discrimination in the representation function.[*] Petitioners do not suggest otherwise.

Petition dismissed.

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[*] The Board stated: "* * * [T]he Board does not consider that it can look behind the National Mediation Board's designation of ALPA as the collective bargaining agent for [the airline's] pilots or inquire into whether the union had discriminated against petitioners in its representation functions." *Air Line Pilots Association* v. *Southern Airways, Inc.*, *supra*, Note 4.